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IN THE

Supreme Court of the United States

October Term, 1966

No. [redacted] 237

ROBERT HIGGINS, *Petitioner*,

v.

THE STATE OF WASHINGTON, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

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ROBERT HIGGINS,
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v.

THE STATE OF WASHINGTON,
Respondent.

No.....

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Washington entered in the above entitled cause on January 17, 1966.

OPINION BELOW

The opinion of the Supreme Court of Washington is reported in *Vol. 67 2d No. 4 Washington Decisions at page 146*, an exact copy of which is attached hereto, marked "Appendix A".

JURISDICTION

The opinion of the Supreme Court of Washington was filed on October 21, 1965, and became the final judgment of the Court on January 17, 1966. Rehearing was denied on January 17, 1966, after the Supreme Court of Washington had reviewed petitioner's Petition for Rehearing. An application for an extension of time in which to file a petition for Writ of Certiorari was granted extending the time to file a petition for Certiorari to and including June 16, 1966.

The jurisdiction of the Court is invoked under 28 USC 1257, Rule 22, of Rules of The Supreme Court of the United States.

QUESTIONS PRESENTED

I.

Does Article III, Section 2, and the Sixth Amendment prohibit a state from imposing criminal responsibility and passing a statute presuming intent to defraud from the mere fact of the departure of a guest from a hotel without payment of the hotel bill?

Is this not an invasion of the right to trial by jury and interference with the Court's judicial functions by the legislature?

II.

Are the due process and equal protection clauses of the 14th Amendment and the rights guaranteed by the 5th Amendment, not to be compelled to be a witness against oneself, violated, where a State Statute provides for a presumption of fraud from the mere fact of the departure of a guest from a hotel without payment of his hotel bill?

III.

Does Article 1, Section 17 of the Washington State Constitution and The United States Constitution prohibit a state from passing a statute providing for criminal responsibility and a presumption of fraud from the mere fact of the departure of a guest from a hotel without payment of the hotel bill?

Does this not constitute imprisonment for debt?

STATUTE INVOLVED

The basic question presented by this petition challenges the Constitutionality of R.C.W. 19.48.110, which reads as follows:

> "Any person who shall willfully obtain food, . . . lodging or accommodation at any hotel, . . . without paying therefor, with intent to defraud the proprietor, owner, operator or keeper thereof . . . shall be guilty of a gross misdemeanor. Proof that . . . he or she absconded, or departed from, or left, the premises without paying for such . . . lodging or accommodation, . . . shall be prima facie evidence of the fraudulent intent hereinbefore mentioned.

STATEMENT

Petitioner, ROBERT HIGGINS, was convicted in Justice Court, Spokane District of the crime of defrauding an innkeeper. On appeal he was found guilty by a jury in the Superior Court, which conviction was thereafter affirmed by the Supreme Court of the State of Washington. A Petition for Rehearing was timely made and denied. A Petition for Writ of Certiorari is herewith presented to this Court.

Petitioner challenges the sufficiency of the evidence to support conviction. Petitioner, and his wife were guests at the Davenport Hotel in Spokane, Washington. There was no evidence he absconded or attempted to "sneak out." Concededly, he hadn't paid his bill. Neither petitioner nor his wife were called as witnesses in The Superior Court. Petitioner contended The State failed to prove his guilt beyond a reasonable doubt. There was some evidence he had some discussion respecting his bill with the room clerk; that he had left a bag with some clothes in it and that a statement which had been mailed to an address he gave was returned undelivered.

Petitioner contended there was no rational connection between the fact proven and the fact to be presumed and that the statutory presumption was arbitrary and in contravention of the due process clause of the United States Constitution, 14th Amendment.

It is well established that a legislative body may create a presumption of one fact from evidence of another having a rational connection therewith, however, "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed. . . . *Tot v. United States,* 319 U.S. 463, 87 L.Ed. 1519.

The Inkeeper's Statute (RCW 19.48.110) in our case doesn't bring the presumption of fraudulent intent into play *limited* to or *conditioned* upon proof of "absconding" but The Statute is worded in the disjunctive and the mere proof that he or she "*departed from,* "*or left,*" the premises without paying for such lodging or accommodation is sufficient to give rise to a presumption of fraudulent intent. Thus, even though the court stated the accused is not being imprisoned for the debt he owes but is being punished for the wrong he perpetrated, this is unsupported by the statute, which permits conviction on the mere proof of the debt and the departure of the guest.

The mere circumstance of departing from the premises without paying the hotel bill gives rise to a presumption of fraudulent intent. The statute is arbitrary and has no rational connection between the fact proved (the owing of a hotel bill) and the ultimate fact presumed (the fraudulent intent).

The Supreme Court of Washington dealt squarely with petitioner's Constitutional argument and held R.C.W. 19.-48.110 (The Innkeeper's Statute) does not violate the due process clause of The United States Constitution 14th Amendment as it was of the opinion there is a rational connection between the fact proved (the departing of a guest without making payment for accommodations received) and the ultimate fact presumed (intent to defraud).

The Court cited the case of *United States v. Gainey*, 380 U.S. 63, 13 L.Ed.2d 658, which held the accused's unexplained presence at a still is sufficient evidence to authorize conviction.

This case is clearly distinguishable—being at the site of a still, which is an inherently illegal operation, does have a rational connection between the fact proved and the ultimate fact presumed. The presence of an accused at a still is not as consistent with innocence as it is with guilt. In our case, however, the mere failure to pay a bill, or debt, is as consistent with innocence as it is with a fraudulent intent.

There is no onus attrubutable to a person merely because he owes a debt and if this fact of a guest departing without making payment for accommodations received can give rise to an intent to defraud and form the basis of a conviction thereon, then it does constitute imprisonment for debt and is violative of the State Constitution, Art. 1, Sec. 17 and The United States Constitution and it is the debt that is being punished not the fraud, as the Court stated, because the Statute doesn't require any fraud—merely the departing from the premises without

payment of the bill is sufficient to bring the presumption of fraud into play.

Why should a hotel debt be any different from any other debt?

In *Barrett v. United States*, 322 F.2d 292 (5th Cir. 1963) the Court held unconstitutional a presumption that the presence of accused at the site of a still shall be deemed sufficient evidence to authorize conviction. The Circuit Court of Appeals held this presumption coerced the defendant into taking the witness stand in violation of his rights under the 5th Amendment and that the due process clause of the 14th Amendment was violated because the presumption did not meet the test of "rational connection" between defendant's presence at the still and his guilt.

The case came before the U. S. Supreme Court on Appeal under the title *U. S. v. Gainey*, 380 U.S. 63, 13 L.Ed. 2d 658 and the Circuit Court of Appeals was reversed, however, as stated above, the case is clearly distinguishable from ours.

Mr. Justice Black and Mr. Justice Douglas dissented.

As Mr. Justice Black stated in his dissenting opinion (380 U.S. 77):

> "I think it flaunts the constitutional power of Courts and Juries for Congress to tell them what shall be sufficient evidence to authorize conviction" And if Congress could not thus directly encroach upon the judge's or jury's exclusive right to declare what evidence is sufficient to prove the facts necessary for conviction, it should not be allowed to do so merely by labeling its encroachment a "presumption."

The legal effect of the rule allowing the accused to be found guilty of a crime solely on the basis of presumption, unless he comes forward with evidence to overcome the presumption is to coerce the accused into taking the stand in spite of the 5th Amendment provision that no person shall be compelled to be a witness against himself.

The accused has more than a right to present evidence in his defense—he has the Constitutional right to do nothing.

In our case the presumption is so unreasonable as to constitute a violation of due process.

The matters urged here were presented to the Supreme Court of Washington.

REASONS FOR GRANTING THE WRIT

The court below has decided important questions of federal law and statutory construction and has extended their application to such an extent that certain basic and inalienable rights have become more and more circumscribed and emasculated.

Certain of these rights are:

1.

The constitutional rights to trial by Jury, guaranteed by Article III Sec. 2 and 6th Amendment.

2.

Of due process of law guaranteed by the 5th Amendment, which includes the right to be tried for a crime in a court according to the law of the land, without any

interference with that court's judicial functions by the legislature.

3.

Of his right guaranteed by the 5th Amendment not to be compelled to be a witness against himself, and

4.

Of his rights guaranteed by the United States Constitution and by The Washington State Constitution Art. 1, Sec. 17, to be free from imprisonment for debt.

These rights, which are so close to each of us, were some of the primary reasons our country was founded.

As pointed out by Mr. Justice Black, 380 U.S. 63 at page 77—"It has always been recognized that the guaranty of trial by jury in criminal cases means that the jury is to be the factfinder. This is the only way in which a jury can perform its basic constitutional function of determining the guilt or innocence of a defendant. *United States ex rel Toth v. Quarles*, 350 U.S. 11, 15-19."

> "It would appear that the problem of whether Congress can so restrict the power of court and jury in a criminal case in a federal court has never been squarely presented to or considered by this Court. . . . From dissenting opinion of Mr. Justice Black, 380 U.S. 78.

In the case of *Bailey v. Alabama*, 291 U.S. 82, 96-97, the Court stated "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional re-

strictions" 219 U.S. at 239, 55 L.Ed. at 200.

The Washington State Supreme Court stated "No constitutional rights of the defendants were impaired when the Washington State Legislature enacted the legislative presumption set out in RCW 19.48.110 nor by the court in instructing the jury thereon. . . ." The court further stated "The trial judge was careful to instruct the jury that the presumption was not conclusive and not binding." The point is that the statute *authorizes* the jury to convict and they may accept it as a basis for their verdict.

Resolution of these questions involves the most elemental concepts of our system of jurisprudence. The full effect of retaining our trial by jury inviolate, our right to be free from imprisonment for debt, and our right not to be compelled to be a witness against ourselves, impels us to repel any and all onslaughts to these basic and inalienable rights regardless of the language in which these encroachments or "presumptions" may be couched.

Respectfully submitted,

BERNARD L. SWERLAND
Attorney for Petitioner

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. ROBERT HIGGINS, *Appellant.*	No. 37589 Department Two Filed October 21, 1965

WARD, J.*—The defendant, Robert Higgins, was convicted in justice court, Spokane District, of the crime of defrauding an innkeeper. On appeal, he was again found guilty by a jury in the Superior Court, and now appeals to this court from the judgment and sentence imposed.

Defendant challenges the sufficiency of the evidence to support conviction. The evidence established and the defendant, by his counsel, admitted that he and his wife were guests at the Davenport Hotel in Spokane from July 21, 1962, until August 1, 1962. The proof of the remaining facts in the case came from the hotel records admitted in evidence under the provisions of the Uniform Business Records as Evidence Act, RCW 5.45.020, and from the testimony of the hotel's cashier and auditor, who had each prepared a part of such records and both of whom testified to the correctness and the manner of keeping such records. No challenge was made to the authenticity of the hotel's records nor to their admissibility under the Uniform Act.

*Judge Ward is serving as a judge pro tempore of the Supreme Court pursuant to Art. 4, §2(a) (amendment 38), state constitution.

The hotel maid makes a daily written report to the cashier showing which guests have vacated rooms assigned to her care. The cashier makes a daily entry of the guest's charges for room occupancy based upon the maid's report. When the report indicates that a guest has vacated his room, if the guest has neither paid his account nor signed the ledger account at the place on the card providing for extension of credit under American Express or Western International Hotels credit cards, the cashier marks the card FTCO (failed to check out) and the next day delivers the guest's account to the hotel auditor for collection.

In this case, the defendant's ledger card was marked FTCO on August 1, 1962. The card also carries the notation "Bag at Porter's Desk (worthless)." The balance then owing on the defendant's hotel account was $186.26. The hotel auditor then mailed a statement of the defendant's account addressed to him at 803 Weatherby Building, Portland, Oregon, the address written by the defendant upon his registration card on July 21, 1962. This mail was returned to the Davenport Hotel, unclaimed, bearing the stamp "Unknown at this address."

The justice court complaint charging the defendant with the crime of defrauding an innkeeper was filed 9 months later. The defendant testified in justice court, but neither he nor his wife was called as a witness at the trial in Superior Court.

The statute under which the defendant was charged, RCW 19.48.110 contains this language:

> "Any person who shall wilfully obtain food, . . . lodging or accommodation at any hotel, . . . without paying therefor, with intent to defraud the proprietor,

> owner, operator or keeper thereof . . . shall be guilty of a gross misdemeanor. . . . Proof that . . . he or she absconded, or departed from, or left, the premises without paying for such . . . lodging or accommodation, . . . shall be prima facie evidence of the fraudulent intent hereinbefore mentioned."

The facts above set out, which the jury had a right to believe, together with the statutory presumption of fraudulent intent, based upon the guest's departure without payment for hotel accommodations received, were sufficient to support the jury's verdict.

The defendant contends that the state has failed to prove his guilt beyond a reasonable doubt. A challenge to the sufficiency of the evidence imposes upon the trial court only the duty to determine whether the evidence is sufficient to carry the case to the jury. The challenge is met if the court finds substantial evidence to support all elements of the crime charged. *State v. Cranmer,* 30 Wn.2d 576, 192 P.2d 331 (1948). If the evidence is conflicting so that reasonable minds may draw different conclusions therefrom, the question is one for the jury's determination. *State v. Emmanuel,* 49 Wn.2d 109, 298 P.2d 510 (1956); *State v. McDaniels,* 30 Wn.2d 76, 190 P.2d 705 (1948). The jury must be instructed that in order to convict they must find from the evidence submitted the defendant's guilt *beyond reasonable doubt.* There inheres in the jury's verdict of guilty a finding that the jury determined the evidence sufficient when so measured. *State v. Long,* 44 Wn.2d 255, 266 P.2d 797 (1954).

The defendant attacks the constitutionality of the statutory presumption in RCW 19.48.110, which permits the jury to find intent to defraud from the guest's departure

without payment for his hotel accommodations. It is defendant's contention that this statutory presumption is arbitrary and requires no rational connection between the fact proven and the fact to be presumed, in contravention of the due process clause of the U. S. Const. Fourteenth Amendment.

In *Seattle v. Ross*, 54 Wn.2d 655, 659, 344 P.2d 216 (1959), we said:

> "It is well established that a legislative body may create a presumption of one fact from evidence of another having a rational connection therewith, without a denial of due process or equal protection of the law. *State v. Spiller, supra*, 146 Wash. 180, 262 Pac. 128; *State v. Fitzpatrick*, 141 Wash. 638, 251 Pac. 875; *Yee Hem v. United States*, 268 U. S. 178, 69 L.Ed. 904, 45 S.Ct. 470. But, as Mr. Justice Roberts, in *Tot v. United States*, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241, in speaking for the court said:
>
> "'. . . a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts.'"

In *Barrett v. United States*, 322 F.2d 292 (5th Cir. 1963), the court held unconstitutional a presumption contained in the Internal Revenue Code relating to illegal distilling, 26 U.S.C.A. §5601 (b) (4), which provides that the presence of defendant at the side of an unregistered still " shall be deemed sufficient evidence to au-

thorize conviction, unless the defendant explains such presence to the satisfaction of the jury."

The Circuit Court of Appeals held this presumption, in effect, coerced the defendant into taking the witness stand in violation of his rights under the provision of the Fifth Amendmant that "No person . . . shall be compelled in any criminal case to be a witness against himself." The court said: "A person accused of a crime has more than the right to present evidence in his defense. He has the constitutional right to sit on his hands."

The Circuit Court of Appeals also held that the presumption violated the due process clause of the Fourteenth Amendmant because the presumption did not meet the test of "rational connection" between defendant's presence at the still and his guilt.

However, this case came before the United States Supreme Court on appeal under the title *United States v. Gainey,*[1] 380 U.S. 63, 13 L.Ed.2d 658, 85 Sup. Ct. 754 (1965). The Circuit Court of Appeals was reversed. The United States Supreme Court said, at page 66:

> "As the Court of Appeals correctly stated in this case, the constitutionality of the legislation depends upon the rationality of the connection "Between the facts proved and the ultimate fact presumed." *Tot v. United States,* 319 U.S. 463, 466. The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it. . . ."[2]

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1. Barrett had died pending appeal and the court substituted in the title the name of codefendant Gainey.

No constitutional rights of the defendant were impaired when the Washington State Legislature enacted the legislative presumption set out in RCW 19.48.110, nor by the court in instructing the jury thereon. The court was justified on the basis of reason and common experience in finding a rational connection between the act of a hotel guest in departing without making payment for accommodations received and an intent to defraud. The presumption is not irrebuttable as in *Seattle v. Ross, supra,* and may be rebutted by facts and circumstance shown requiring the defendant to become a witness in his own behalf. *United States v. Gainey, supra.*

The trial judge was careful to instruct the jury that the presumption was not conclusive. By instruction No. 11, the court instructed that the presumption ". . . is not binding on you, the jury, even though no attempt is made to rebut it, and you are to give it just such weight as to you it seems to deserve."

The defendant claims that under the jury's verdict he will be imprisoned for debt, not crime.

A challenge to the constitutionality of the Innkeeper's Statute under Const. Art. 1 §17, prohibiting imprisonment for debt was raised in *In re Milecke,* 52 Wash. 312, 315, 100 Pac. 743 (1909). Judge Chadwick, speaking for the court, said:

> "The use of the word "debt" in the discussion of this kind of legislation has unfortunately raised an

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2. A case following the rationale of *Barrett v. United States, supra,* decided September 25, 1964, before its reversal in *United States v. Gainy, supra,* is *State v. Edwards,* 130 N.W.2d 623 (Minn. 1964). This case at page 625 lists recent decisions both supporting the constitutionality of the statutory presumption and also those decisions rejecting the constitutionality of such presumption.

> issue of law that is unwarranted. The fault of the appellant resulted in a debt, he can find protection under §17, Art. 1, of the Constitution. . . .

The defendants brief cites *Chauncey v. State*, 130 Ala. 71, 73, 30 So. 403 (1900). In that case, the court quotes with approval from *Ex parte King*, 102 Ala. 182, 15 So. 524, discussing the Alabama Innkeeper's Statute, as follows:

> "The act is in line with our other statutes against false pretenses, fraud, cheats, acts to injure and the like. One who violates the act, is imprisoned not for the debt he owes the proprietor, and not to make him pay it, but to punish him for a wrong he has perpetrated, which is made a crime. . . ."

The judgment is affirmed.

WARD, J., Pro Tem.

We concur:

ROSELLINI, C. J.

DONWORTH, J.

FINLEY, J.

WEAVER, J.

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent*, v. ROBERT HIGGINS, *Appellant*.	REMITTITUR No. 37589 Spokane County No. 17520

This is to certify that the opinion of the Supreme Court of the State of Washington filed on October 21, 1965, became the final judgment of this court in the above entitled case on January 17, 1966. This cause is remitted to the superior court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to Rule 55 on Appeal, costs are taxed as follows:

One Hundred Forty-four and 12/100 ($144.12) Dollars in favor of respondent and against appellant.

The Petition for Rehearing was Denied by an Order filed January 17, 1966.

cc: Court Reporter
MR. BERNARD L. SWERLAND
HON. GEORGE A. KAIN
MR. DONALD C. BROCKETT

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 17th day of January, A.D. 1966.

WILLIAM M. LOWRY
Clerk of the Supreme Court, State of Washington.